No. 82-1295

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ESCAMBIA COUNTY, FLORIDA, *et al.*,
Appellants,

v.

HENRY T. McMILLAN, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF OF APPELLANTS KENNETH J. KELSON, MAX L. DICKSON, JOHN E. FRENKEL, JR., BILLY G. TENNANT, GERALD WOOLARD AND MARVIN BECK

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Appellants Kenneth J. Kelson ("Kelson"), Max L. Dickson ("Dickson"), John E. Frenkel, Jr. ("Frenkel"), Billy G. Tennant ("Tennant"), Gerald Woolard ("Woolard") and Marvin Beck ("Beck"), through counsel, submit this reply to the Brief of Appellees.[1]

ARGUMENT[2]

I. Appellees Have Conceded that the Suit Should Have Been Brought Against the State, State Officials and/or State Entities.

Appellees have conceded that they should have brought this suit against the State of Florida, the Governor, and/or the Flo-

[1]The reasons why this brief is filed on behalf of these persons are set forth in the December 6, 1983 letter from counsel to the Clerk of the Court.

[2]Citations to material which appear in: the Jurisdictional Statement are to "J.S.;" and the Joint Appendix are to "J.A.".

rida Legislature and the members thereof, etc. Rather than attempting to refute appellants' position that the suit should have been brought against those responsible for the at-large election system in issue, appellees seek to divert attention from their fatal concession by now claiming[3] that this Court lacks jurisdiction of the appeal because "the Court of Appeals has not held any state statute to be invalid in the instant case."[4] Appellees base this claim on the misleading and unsupported contention that Fla. Const. art. VIII §1(e) "has not been invalidated" for elections to the Escambia County, Florida ("Escambia") Board of County Commissioners ("County Commission").[5] While recognizing that the district court invalidated Fla. Const. art. VIII, §1(e),[6] appellees contend that the Fifth Circuit merely "held that relevant local officials of Escambia County, for invidious racial reasons, have chosen not to exercise the option afforded by the home rule provisions of the state constitution to change to single-member districts."[7] This contention strains credulity beyond recognition.

A. The Fifth Circuit Invalidated Florida's Constitutional Requirement for the At-Large Election of Escambia's County Commissioners.

Even if appellees' characterization of the Fifth Circuit's holding in *McMillan v. Escambia County, Florida ("McMillan III")*[8] were accurate, which it is not, it ignores the relief granted. The court did not direct the County Commission "to exercise the option afforded by the home rule provisions of the state constitution . . . ." If that were the object of the suit, it could have been brought in the state courts under Florida law. The Fifth Circuit, instead, affirmed, inter alia, the portion of the district court's decision declaring that Florida's constitutional

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[3]Appellees' Motion To Affirm or Dismiss, of course, was the proper place for appellees to have made their jurisdictional argument.

[4]Brief of Appellees at 8.

[5]*Id.*

[6]*Id.* at 4.

[7]*Id.* at 8.

[8]688 F.2d 960 (5th Cir. 1982). (J.S. 1a.)

requirement for the at-large election of Escambia's county commissioners violates the fourteenth amendment.[9]

Further, appellees' description of the Fifth Circuit's holding is inaccurate. The court did not limit its holding to the actions by the County Commission on the proposals by the 1975 and 1977 charter committees. In upholding the district court's decision, the Fifth Circuit concluded:

> The [district] court relied on the aggregate of these findings involving *Zimmer* factors and other evidence in determining that *the at-large system in Escambia County is being maintained for discriminatory purposes*. . . . [W]e cannot say the district court's finding of intent was clearly erroneous.[10]

In conclusion, the court held: "we AFFIRM the district court's holding that the election system for the Escambia County Commission violates the fourteenth amendment."[11]

The County Commission's actions on the charter proposals were only one of the factors the court addressed. As discussed in the Brief of Appellants, at 29-32, the Fifth Circuit in *McMillan v. Escambia County, Florida ("McMillan I")*[12] specifically disagreed with the district court that the County Commission's actions on the charter proposals were racially motivated. In its brief discussion of those actions in *McMillan III*, the court did not retract its original conclusion. Indeed, the court stressed that "we do not depart from our prior conclusion that desire to maintain one's incumbency does not equal racially discriminatory intent."[13]

In their brief on appeal of the district court's actions on remand from the decision in *McMillan III*, filed after appellees filed their brief in the instant appeal, appellees described the decision in *McMillan III* as having "affirmed the District Court's judgment striking down the at-large county commission

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[9] *McMillan III*, 688 F.2d at 973. (J.S. 29a.)
[10] *Id.* at 969 (emphasis added). (J.S. 21a-22a.)
[11] *Id.* at 973. (J.S. 29a.)
[12] 638 F.2d 1239 (5th Cir. 1981). (J.S. 30a.)
[13] *McMillan III*, 688 F.2d at 969 n. 19 (J.S. 20a.)

election system and installing a court-ordered election plan."[14] Thus, it appears that even appellees honestly do not believe that the court's holding was limited to the County Commission's actions on the charter proposals.

B. The Purpose of Appellees in Bringing the Suit Was To Invalidate the State's At-Large Election System.

The Complaint,[15] Pretrial Stipulation,[16] statements at trial by counsel and Brief of Appellees confirm that the Fifth Circuit's decision could not have been directed solely to the County Commission's actions on the charter proposals. The Complaint makes no mention of those actions. Indeed, the decision to delete from the 1977 charter referendum a single-member district proposal was made after appellees filed the Complaint. The Complaint never was amended.[17] The primary relief appellees always sought was "a declaratory judgment that the election system[ ] complained of herein violate[s]" the federal Constitution and statutes.[18]

Similarly, the Pretrial Stipulation, filed long after the County Commission's actions on the charter proposals, makes no mention of those actions. Instead, in describing their case, appellees stipulated that "[p]laintiffs contend that, accordingly, the *at-large election systems* are fundamentally unfair, with respect to black citizens, and violate their rights. . . ," and that

> the evidence will show intentional, invidious *racial discrimination by the State of Florida, its officers and subdivisions* according to the following alternative standards.
>
> a. *The systems of at-large elections in both the primary and general elections,* . . . were each designed and

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[14]Brief of Appellees at 3, McMillan v. Escambia County, Fla., No. 83-3275 (11th Cir. appeal docketed Apr. 27, 1983).

[15](J.A. 45.)

[16](J.A. 64.)

[17]The fact that the Complaint does not mention that the injury appellees now claim is the result of the actions by the County Commission on the charter proposals further shows that appellees' case fails to satisfy the "case or controversy" requirement of U.S. Const. art. III, §2, cl. 1, Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 261 (1977). *See* Brief of Appellants at 28 n. 105.

[18]Compl. *ad damnum* clause. (J.A. 50.)

have been maintained purposefully and invidiously to discriminate against black voters.

b. . . . [T]he aforesaid *at-large election systems carry forward and perpetuate the effects of past intentional devices employed by the State* to discriminate against black voters.[19]

At trial, counsel for appellees stated: "Finally, with respect to application to Escambia County, Judge, it should be recognized that the county governments are presently operating under statewide statutes."[20] Lastly, the innumerable references throughout the Brief of Appellees to actions by the State, state officials and state entities dating back more than one hundred (100) years further show that appellees brought this suit to attack Florida's constitutional provision for at-large elections.

C. If the Decision of the Fifth Circuit Is Upheld, Florida Could Be Left with a State Constitutional Provision with No Application in Florida and with No Opportunity for the State To Have Its "Day in Court."

Upholding the Fifth Circuit's decision will allow others situated similarly to appellees to go county by county through Florida's remaining, sixty-one (61) non-charter counties challenging the State's constitutional requirement for the at-large election of county commissioners without ever suing the State, state entities or state officials. Even though, as here, those cases likely would be based primarily on actions taken at the state level, those responsible for the actions never would be required or given the opportunity to defend the allegations against them. Further, the counties and county officials sued may not be expected to defend adequately the actions of others.[21] As a result, Florida could be left with a constitutional

[19]Pretrial Stipulation ¶C(1), (3) (emphasis added). (J.A. 64, 65.)

[20]Transcript at 22. (J.A. 152.)

[21]To expose counties and county officials to such a possibility would be contrary to this Court's teaching in Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26 (1976), that "the 'case or controversy' limitation of Art. III still requires that a federal court act only to redress injury that fairly can be traced to the challenged action of the defendant and not injury that results from the independent action of some third party not before the court." 426 U.S. at 41-42.

provision with no application in Florida and with no opportunity for the State to have its "day in court." The same would be true in other states with similar state constitutional or statutory frameworks. This Court should not sanction such a denial of justice and open-ended invitation to federal litigation.

D. Even if the Court Were To Conclude That It Lacks Appellate Jurisdiction, Certiorari Should Be Granted.

Appellees next contend that, lacking appellate jurisdiction, the Court also should deny certiorari 1) because, if the Court reverses under the fourteenth amendment, it will have to remand the case for consideration under amended section 2 of the Voting Rights Act of 1965,[22] and 2) because the remedy issues appellants have raised are without merit.[23] Neither of these reasons would support a denial of certiorari.

Since this suit should have been brought against the State, state officials and/or state entities, a decision by any court on the fourteenth amendment, amended section 2 or remedy issues would be improper. For this reason alone, certiorari review of the Fifth Circuit's decision would be necessary.

1. The Possible Application of Amended Section 2 of the Voting Rights Act of 1965 Would Not Support a Denial of Certiorari.

Appellees' contention that a reversal under the fourteenth amendment would necessitate remand for consideration of amended section 2 presupposes that the Court first decides the case. If the Court were to deny certiorari, it would not reverse under the fourteenth amendment, and there would be no remand.[24] Appellees' reliance on *Cross v. Baxter*[25] is misplaced.

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[22]42 U.S.C.A. §1973 (West Supp. 1983).

[23]Brief of Appellees at 9-10.

[24]It is unlikely that the Court would evaluate appellees' claims first under the fourteenth amendment and then under amended section 2. The Court often has held that, when possible, a suit must be resolved on statutory rather than constitutional grounds. *E.g.*, United States v. Clark, 445 U.S. 23, 27 (1980). If the Court were to conclude that amended section 2 is applicable, it is, therefore, probable that it would weigh appellees' claims first under that statute.

[25]___ U.S. ___, 103 S.Ct. 1515 (1983).

In *Cross*, the Fifth Circuit held that plaintiffs had not shown that the at-large election system challenged violated the fourteenth amendment.[26] This Court granted certiorari and remanded for consideration of plaintiffs' claims under amended section 2. In contrast, the Fifth Circuit herein held that appellees had shown a fourteenth amendment violation. Because consideration of amended section 2 would not have affected the court's decision, it declined to address the amended section 2 issue.[27] Unlike *Cross*, a remand could not produce a different result. However, it would delay resolution of the case.

Additionally, there is no basis for appellees now to suggest that this Court is incapable of resolving amended section 2 issues when they have not been addressed below. Appellees previously claimed that the Fifth Circuit's decision summarily could be upheld under amended section 2 and presented arguments in support of that position.[28] Now that the Court has granted plenary consideration, appellees seek to avoid such consideration but this time due to the possible involvement of amended section 2. In any event, the plurality opinion in *City of Mobile, Alabama v. Bolden*[29] demonstrates that the Court can and will resolve statutory issues even when not addressed by the courts below.[30] Moreover, Congress enacted amended section 2 to codify the standards this Court articulated prior to *Bolden*.[31] Consequently, no court better is able to interpret and apply amended section 2 than this Court.

The possible involvement of amended section 2, however, does not warrant further briefing. Appellees were aware of and raised the amended section 2 issue and had the opportunity in their brief on the merits to address further that issue. However, they deliberately chose not to do so. Further briefing unduly would prolong the case and would burden the Court with additional, unnecessary briefs.

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[26]Cross v. Baxter, 688 F.2d 279 (5th Cir. 1982), *vacated*, ____ U.S. ____, 103 S.Ct. 1515 (1983).

[27]*McMillan III*, 688 F.2d at 961 n.2. (J.S. 3a.)

[28]Motion To Affirm or Dismiss at 7-12.

[29]446 U.S. 55 (1980).

[30]*Id.* at 60-61.

[31]S. Rep. No. 417, 9th Cong. 2d Sess. 28-30, *reprinted in* 1982 U.S. Code Cong. & Ad. News 177, 205-08.

2. The Decisions Below on the Remedy Have Far-reaching Consequences Both in Florida's Sixty-Two (62) Non-Charter Counties and, Nationwide, in Those Instances Where a Federal Court Has To Decide Whether To Substitute Its Will on Matters of Redistricting and Reapportioning for the Judgment of a Legislative Body.

The decisions below are based on interpretations of this Court's decisions and on disregard of the Florida Supreme Court's decisions on the powers of non-charter county county commissions.[32] The lower courts' decisions greatly expand the instances in which a federal court may impose a judicially created election system and apportionment plan and, in contravention of the Florida Supreme Court's interpretation, narrowly interpret the powers the Florida Constitution and statutes provide county commissions. If this Court holds for appellees on the liability issue, resolution of the remedy issue will be necessary not only to determine whether the courts below correctly have understood this Court's decisions regarding the circumstances in which a federal court is to defer to the judgment of a legislative body but also to avoid the lower courts' erroneous failure to follow the interpretation of the Florida Constitution and statutes by the Florida Supreme Court.

Appellants, therefore, are not "asking the Court to disregard the state constitution,"[33] but, rather, to uphold the Florida Constitution as interpreted by the body whose interpretation is controlling[34]. Appellants also are not asking the court "to inject itself unnecessarily in a question the Florida Legislature is about to consider"[35]. The July 19, 1983 letter from the Florida Attorney General on which appellees rely simply recommends that the Florida Legislature consider amending Florida's Constitution. Amending that Constitution is a time-consuming process which the Legislature lacks the power on its own to accomplish.[36] In effect, appellees want this Court to withhold otherwise proper relief based on the mere possibility that in

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[32]*See* Brief of Appellants at 42-49.

[33]Brief of Appellees at 10.

[34]*See* Brief of Appellants at 47n. 171.

[35]Brief of Appellees at 10.

[36]*See* Fla. Const. art. XI, §5.

several years the State may amend its Constitution in an unspecified way. Such a position is untenable. Moreover, implementation of the County Commission's remedy would not prevent consideration of a constitutional amendment.

Finally, the remedy the district court imposed on remand was premised on that court's conclusion that it was bound by the decision herein appealed.[37] Although this Court's resolution of the remedy issues might not resolve all of the issues presently on appeal of the district court's actions on remand, this Court's decision is likely to be dispositive of the threshold issue involved in that appeal – whether the courts below erred in adopting Justice White's analysis in *Wise v. Lipscomb*[38]. For these reasons, even if the Court holds that it lacks appellate jurisdiction, certiorari should be granted.

II. Even if the Fifth Circuit Had Based Its Decision on the County Commission's Actions on the Charter Proposals, That Decision Would Have Been Erroneous.

Even if the Fifth Circuit had upheld a finding that the County Commission's actions on the charter proposals were taken for discriminatory reasons, that decision would have been erroneous because there was no evidence that the County Commission's actions were racially motivated. In contending otherwise, appellees first claim that the Commissioners contradicted themselves.[39] Appellees' arguments are without merit. For example, the Commissioners' belief that the at-large system is best for Escambia is not inconsistent with the desire to maintain their incumbencies. Rather, it is a case where the interests of Escambia, as perceived by the Commissioners, coincide with the interests of the Commissioners, which, as the Fifth Circuit concluded, may not be translated into the desire to exclude potential black candidates.

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[37]McMillan v. Escambia County, Fla., 559 F.Supp. 720, 722, 725 (N.D. Fla. 1983) (Memorandum Decision), *appeal docketed,* No. 83-3275 (11th Cir. Apr. 27, 1983), *petition for cert. before judgment denied,* ___ U.S. ___, 104 S.Ct. 108 (1983).

[38]437 U.S. 535 (1978).

[39]Brief of Appellees at 11-13.

Similarly, the option some Commissioners exercised to select, from among roads needing repaving in their residency districts, roads to be repaved does not contradict their testimonies that they represent all of Escambia. Beck, on whose testimony appellees primarily rely, stated that most of the unpaved roads in Escambia were located in his residency district.[40] Because of the at-large system and the need for all commissioners to be responsive to the interests of the entire County, Beck further stated that the County Commission voted his residency district more road paving funds than the other districts.[41] After the County's engineering staff determined which roads needed repaving, Beck assisted that staff in determining which of the roads in his residency district were to be repaved.[42] Thus, the combination of the residency requirement and the at-large election system balance each other. The residency requirement ensures that the County Commission is comprised of persons who reside, and know the needs of the people, in all areas of the County while the at-large system ensures that the elected officials do not serve only the interests of the people in their residency districts.

Regarding the Commissioners' testimonies on the charter proposals, Deese was not unable to explain why, as a member of the second charter committee, he voted for the charter proposal "and then reversed his position when the charter came before the county commission[43]." Deese testified that he "did not object to" the recommendation by the committee for inclusion of a proposal for single-member district elections.[44] He voted for the charter proposal package as a whole. The County Commission made "a multiple of changes" to the committee's proposal, and Deese again voted for the proposal as a whole.[45] Appellees' assertion that Beck "had not consulted or heard from black citizens concerning their feelings about the election structure"[46]

[40]Transcript at 1468-69. (J.A. 474).

[41]*Id.* at 1469-70 (J.A. 474-75).

[42]*Id.* at 1474-76 (J.A. 478-79); *but see id.* at 1501-02 (testimony of Kelson that he left road paving matters entirely to the engineering staff) (J.A. 498).

[43]Brief of Appellees at 12.

[44]Transcript at 1543. (J.A. 529.)

[45]*Id.* at 1544-45. (J.A. 530.)

[46]Brief of Appellees at 12.

is untrue. Beck stated that he had heard from Lawrence Green, who favored the at-large system.[47] Beck simply was unable to remember the names of other blacks with whom he had spoken.[48]

Appellees' claim that Kenney's testimony at trial contradicted the views he expressed at a public hearing on the charter[49] also is untrue. At that hearing, Kenney said that he had not decided which election system he preferred. Immediately after making the statement appellees quoted, Kenney went on to state:

> That's one side of it . . . . We are coming here tonight to get ideas from the public to incorporate into the final document which will be presented in November and I would be glad to hear more from you in a personal way on what you think might be the reaction regarding additional candidates, a lot of people to choose from, and all political philosophies, . . . and all races. . . . I went along with this thing and my mind could be changed for very good reasons and I would like to talk to you more about it.[50]

At trial, Kenney stated that he voted for the at-large system because he had made up his mind that there are "issues and problems that transcend district lines."[51]

Finally, three Commissioners did not testify that they "would not consider blacks' vote dilution in deciding their preference for election plans[52]." Beck and Kelson testified that blacks had an equal chance to be elected under the at-large system.[53] Deese, when asked whether, "from a political science standpoint," he would favor an election system that gave minorities "the best opportunity for full representation" responded that he was not a political science expert.[54] These statements hardly may be taken as a refusal to consider the interests of blacks.

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[47]Transcript at 1491. (J.A. 491.)
[48]*Id.* at 1493. (J.A. 492.)
[49]Brief of Appellees at 12.
[50]Notice of Filing Exh. A at 2 (Plaintiffs' Exhibit 73). (J.A. 1135.)
[51]Transcript at 1558-59. (J.A. 540.)
[52]Brief of Appellees at 12.
[53]Transcript at 1489, 1510. (J.A. 488, 504.)
[54]*Id.* at 1545-46. (J.A. 530-31.)

Next, abandoning their previous reliance on the *Zimmer v. McKeithen*[55] factors,[56] appellees contend that, under *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,[57] the finding that the County Commission's actions on the charter proposals were racially motivated was correct.[58] Even under the *Arlington Heights* analysis, that finding would be clearly erroneous. With respect to the impact of official action, appellees ignore the official action requirement. For example, in alluding to threats allegedly received by certain black candidates, only two (2) of whom ran for the County Commission, appellees acknowledge that the threats were made only by private individuals – "the hostility of the white electorate, much of it openly expressed."[59] Similarly, apart from the defects in the evidence concerning racially polarized voting,[60] voting is a personal right[61] and may not be characterized as official conduct.[62]

[55]485 F.2d 1297 (5th Cir. 1973), *aff'd on other grounds sub nom.* East Carroll Parish School Bd. v. Marshall, 424 U.S. 636 (1976).

[56]*See, e.g.*, Motion To Affirm or Dismiss at 3-7.

[57]429 U.S. 252 (1977).

[58]Brief of Appellees at 14-26.

[59]*Id.* at 17.

[60]*See* Brief of Appellants at 35-36.

[61]*See, e.g.*, Reynolds v. Sims, 377 U.S. 533, 580 (1964).

[62]As to appellees' allegations concerning the socio-economic conditions of the black community, Brief of Appellees at 19, appellees first fail to differentiate between the local governing bodies which have control over the areas in which blacks live. For example, appellees rely heavily on the testimony of Peter A. DeVries, the City Planner for Pensacola. He was called as a witness by the city defendants to discuss the efforts the City had made to improve the black community in Pensacola. Next, the documentary evidence to which appellees refer consists largely of studies the various local governments in Escambia and neighboring Santa Rosa County undertook to identify, and recommend solutions to, the problems in their communities. *See, e.g.*, Neighborhood Analysis Pensacola SMSA (Plaintiffs' Exhibit 17). (J.A. 798.) Rather than showing that the local governments were insensitive to the needs of blacks, this evidence shows that they actively were interested in improving the conditions of the black community.

As to appellees' contention that the at-large system has resulted in underrepresentation of blacks on county boards and committees, Brief of Appellees at 20, there is no support. The district court ad-

While the historical background on which appellees rely may involve official conduct, it is not the conduct of Escambia or its county commissioners. As appellees' brief makes clear, that historical background involves the conduct of the State, state officials and state entities. Typical is the assertion that "[t]he Florida Legislature and the Democratic Party bore the responsibility for the exclusion of blacks from the real election for county commissioners. . . ."[63] Whatever may be the merits of these assertions, they should be addressed only in a suit against those arguably responsible for that historical background.

Appellees' allegations concerning the sequence of events, procedural and substantive departures and legislative history surrounding the actions on the charter proposals are unsupported. The County Commission had no duty to consider a charter form of government. However, in 1975, it appointed a five (5)-member charter study committee, including one black,[64] to study the possibility of a charter government for Escambia. Three (3) members of that committee agreed on a proposed

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dressed jointly the appointments by the County Commission and the Pensacola City Council. The only explanation the court gave for the underrepresentation of blacks were statements by a former Mayor of Pensacola and a former city councilmember that blacks were not visible to them. McMillan v. Escambia County, Fla., PCA No. 77-0432, typescript op. at 17 (N.D. Fla. July 10, 1978) (Memorandum Decision). (J.S. 87a.) There was no such evidence with respect to the Commissioners' appointments. Instead, the evidence shows that any black who expressed an interest in being appointed to a county board or committee would be appointed. *See, e.g.*, transcript at 1557-58 (testimony of Kenney). (J.A. 539.)

[63]Brief of Appellees at 22. In any event, appellees' allegations of prior discriminatory conduct at the state level stand in marked contrast with the current conduct of Escambia and the County Commission. In finding that the Commissioners generally are responsive to the needs of blacks, the district court recognized that "[t]heir efforts in employment and public recreation were impressive" and that they "listen to and act upon requests and complaints by blacks." McMillan v. Escambia County, Fla., PCA No. 77-0432, typescript op. at 15 (N.D. FLa. July 10, 1978) (Memorandum Decision). (J.S. 85a.)

[64]Transcript at 576 (testimony of Tennant, chairperson of the charter study committee). (J.A. 312.)

charter and submitted a majority report.[65] Two (2) members disagreed with the idea of a charter and submitted a minority report.[66] The County Commission then appointed a second committee "to review the differences between the majority and minority report and come back with another document."[67] The second committee submitted another proposed charter.[68] The County Commission reviewed that proposal and agreed on a variety of changes, including the proposal for single-member district elections. As Tennant testified, however, the power to make those changes was within the purview of the County Commission: "[A]ny document prepared by the committee would have to go to the Board of County Commissioners for final ratification or for whatever usage they would prefer to put it to."[69] The charter proposal, as changed, was published in the

[65]Charter Government Study Committee Report (Plaintiffs' Exhibit 98). (J.A. 1155.)

[66](Plaintiffs' Exhibit 99.) (J.A. 1225.)

[67]Transcript at 580 (testimony of Tennant). (J.A. 315.)

[68]Charter Government Study Committee Report (Plaintiffs' Exhibit 100). (J.A. 1228.)

[69]Transcript at 582-83. (J.A. 316.) The charter committees only were advisory committees and not statutory charter commissions to whose proposals the County Commission was bound.

Appellees erroneously claim that the County Commission "controlled what charter propositions would be submitted to Escambia County's voters," Brief of Appellees at 22. Under Fla. Stat. § 125.61 (1981), if fifteen (15) percent of a county's electorate signs a petition requesting the establishment of a charter commission, the county commission must appoint a charter commission of between eleven (11) and fifteen (15) members. Unless extended, within eighteen (18) months, the charter commission must submit to the county commission a charter proposal; and, shortly thereafter, the county commission must hold a referendum. *Id.* §§125.63, 125.65 (1981). Blacks in Escambia comprised approximately seventeen (17) percent of Escambia's registered voters. *See* Brief of Appellants at 5. Their percentage of the electorate in and of itself would have enabled them to require the appointment of a charter commission.

Section 125.61 also allows a county commission to adopt a resolution calling for the appointment of a charter commission. It too must consist of between eleven (11) and fifteen (15) members. For this reason alone, the County Commission's charter committees were not statutory charter commissions but only advisory committees.

newspapers, and eight (8) public meetings on the proposal were scheduled.[70]

The primary concern among the electorate was whether a charter would establish a consolidated government with Pensacola.[71] The meetings, however, were sparsely attended.[72] Although appellees cite to the appearances at one of the meetings, all of which took place after the commencement of this suit, of three (3) blacks who expressed a preference for single-member district elections,[73] there certainly was no general sentiment shown by the black community in favor of a single-member district system. Further, even if blacks overwhelmingly had requested single-member district elections, the mere failure of the County Commission to accede to that request would not provide the basis for condemning its actions as racially motivated. Discriminatory purpose "implies that the decision-maker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."[74] The charter committees' recommendations for a single-member district election system were not based on racial considerations;[75] and the County Commission's decision to include in the 1977 charter referendum a proposal for at-large elections was made for valid reasons unrelated to race.[76]

III. Whatever May Be the Merits of the Additional Bases Appellees Claim for Affirming the Judgment Below, They Should Be Addressed in a Suit Against the State, State Officials and/or State Entities.

Appellees next contend that the historical evidence and objective factors provide "additional fourteenth and fifteenth

[70]*See* Pensacola News-Journal – The Proposed Charter for Escambia County Government (Plaintiffs' Exhibit 72).

[71]*Id.* at 2; transcript at 575 (colloquy between the court, counsel for appellees and Tennant). (J.A. 311.)

[72]*E.g.* Transcript at 1500 (testimony of Kelson). (J.A. 497.)

[73]Brief of Appellees at 24-25.

[74]Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979) (footnote omitted).

[75]*See* Brief of Appellants at 31 n.115.

[76]The County Commission could not have held a referendum solely to change the method of electing county commissioners. *See* Fla. Const. art. VIII, § 1(e).

amendment bases for affirming the judgment below."[77] This evidence and these factors, however, pertain only to the State. Indeed, in discussing the historical evidence in the context of their fifteenth amendment claim, appellees acknowledge that the suit should have been brought at the state level: "[F]ederal courts are not powerless to provide a remedy in those counties, like Escambia, *where the state cannot demonstrate affirmatively* that the unconstitutionally established at-large structure no longer disadvantages the class of black citizens."[78] Appellees have not allowed the State to demonstrate anything.[79]

The objective factors to which appellees refer, *e.g.*, the majority vote requirement in the primaries, the residency requirement, are provisions of the state Constitution and statutes[80]. Escambia and the County Commission, of course, are unable to enact or amend Florida's Constitution and statutes. In order to ensure satisfaction of the federal constitutional requirement of an actual "case or controversy," appellees claims based on the objective factors, and those based on state history, should be resolved only in a suit against those responsible for the harm appellees allege.

IV. The Decision Below May Not Be Upheld Under Amended Section 2 of the Voting Rights Act of 1965.

Assuming the Court concludes that appellees did not need to bring this suit against the State, state officials and/or state entities, the Court's decision in *Rogers v. Lodge*[81] suggests that the decision below still may not be affirmed under amended section 2 of the Voting Rights Act of 1965. As previously discussed, this Court has held that it will not decide a case on constitutional grounds where it may be decided on statutory grounds.[82] Appellees have pointed out that amended section 2 was applicable immediately to pending litigation.[83] Amended section 2 was in

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[77]Brief of Appellees at 26.

[78]*Id.* at 28 (footnote omitted) (emphasis added).

[79]The State was not notified of the suit as required by 28 U.S.C. §2403(b) (1976). *See* Jurisdictional Statement at 3.

[80]*See* Brief of Appellants at 3-6.

[81]458 U.S. 613 (1982).

[82]*See supra* note 24.

[83]Brief of Appellees at 9 n.4.

effect prior to this Court's decision in *Rogers*. Nevertheless, the Court based its decision entirely on the fourteenth amendment. The reasons which apparently led the Court to conclude that amended section 2 was inapplicable in *Rogers* apply to this suit and suggest that amended section 2 again is inapplicable.[14]

Even if the Court were to conclude further that amended section 2 is applicable, it still would not provide a basis for affirming the decision below. Appellants have demonstrated that the district court's finding of discriminatory intent and its subsidiary findings are clearly erroneous.[15] All that appellees have been able to show is that the three (3) blacks who ran for the County Commission were defeated and that blacks are not represented on the County Commission in proportion to their percentage of the population. The language of amended section 2 makes clear that lack of success at the polls and lack of proportional representation do not establish a violation. Accordingly, the decision below may not be affirmed under amended section 2.

V. The County Commission Was the Proper Legislative Body To Adopt as a Remedy a "Legislative Plan."

Appellees' suggestion that the imposition of a judicially created remedy was correct because the district court found that the County Commission had acted for discriminatory reasons and because Escambia's voters rejected the remedy the County Commission adopted[16] is premised on an inaccurate statement of fact and a position this Court has rejected. Escambia's voters did not reject the County Commission's remedy. They rejected a charter proposal which included an election system similar to the remedial election system the County Commission adopted.[17] In 1977, however, the voters rejected a charter proposal which retained the at-large system. The rejection of the 1979 charter proposal, therefore, was not a rejection of the County Commission's remedy but of a charter form of government.[18]

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[14] *But cf.* Cross v. Baxter.

[15] Brief of Appellants at 29-42.

[16] Brief of Appellees at 37.

[17] *See* Brief of Appellants at 12-13.

[18] *Id.* at 31-32.

Further, the notion that the court could not implement the County Commission's remedy because the court had found that the County Commission had acted for discriminatory reasons is tantamount to arguing that remedial redistricting and reapportioning may be performed only by courts and never by legislative bodies. Even Justice White's analysis in *Wise v. Lipscomb*, on which appellees rely so heavily, rejects this view. The district court in *Wise* found against Dallas' legislative body.[89] Nevertheless, Justice White concluded that the remedy that body adopted could be implemented as a "legislative plan."[90] A finding against a legislative body, thus, does not require imposition of a judicially created remedy.

A. In *McDaniel v. Sanchez*, the Court Resolved the Issue Left Open in *Wise*.

Appellees misinterpret appellants' position on *McDaniel v. Sanchez*[91] as being that it overruled *Wise*.[92] Appellants made no such argument because there was no holding in *Wise* on the manner of determining the characteristics of a "legislative plan." Indeed, that was the issue on which the opinions of Justices White and Powell differed. In *McDaniel*, the Court resolved the difference by adopting Justice Powell's analysis.

Appellees' contention that *Wise* and *McDaniel* involved different issues[93] is refuted by the lengthy discussion of the opinions in *Wise* and the observation that "both Justice WHITE's opinion and Justice POWELL's opinion surely foreshadowed the holding we announce today."[94] Although the ultimate issue to be decided in *McDaniel* differed from that in *Wise*, the adoption of Justice Powell's analysis in no way was limited to those instances in which a remedy is adopted by a legislative body subject to preclearance under section 5 of the Voting Rights Act of 1965[95].

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[89] 437 U.S. at 537-38 (White, J.).

[90] *Id.* at 546, *accord id.* at 549 (Powell, J.).

[91] 452 U.S. 130 (1981).

[92] *See* Brief of Appellees at 40.

[93] *Id.* at 42.

[94] *McDaniel*, 452 U.S. at 146.

[95] 42 U.S.C. §1973c (1976).

B. The Courts Below Incorrectly Applied Justice White's Analysis in *Wise*.

Even if the Court holds that Justice White's analysis controls, the lower courts erred in applying that analysis. Appellees' arguments to the contrary reflect a fundamental misunderstanding of Justice White's opinion. This is reflected most clearly in their reliance on the July 19, 1983 letter from the Florida Attorney General[96]. Although, because that letter is not part of the record, appellants are unable to determine with certainty the context in which the letter was written, it apparently was not addressed to the issues presented by Justice White's opinion. The letter refers to Fla. Const. art. VIII, §1(e); Fla. Stat. §124.01 (1981). Article VIII, section 1(e) is the state provision for at-large elections challenged herein. Section 124.01 references that provision and provides for the periodic reapportionment of the county commissioners' residency districts. Appellants do not dispute that these provisions do not authorize the County Commission to change the method of electing county commissioners or that, ordinarily, the County Commission may not change the election system. In this regard, the case is similar to *Wise* wherein the argument was made that the City Council lacked the power to adopt a remedy "because the at-large system declared unconstitutional was established by the City Charter and because, under the Texas Constitution . . . and Texas statutory law, . . . the Charter cannot be amended without a vote of the people."[97] In concluding that the City Council's remedy was a "legislative plan," Justice White accepted the district court's reasoning that the City Council "was not purporting to amend the City Charter but only to exercise its legislative powers as Dallas' governing body" and further noted that there was no prohibition on the City Council's authority to enact a remedial election plan.[98]

Similarly, the County Commission was not acting to change Florida's Constitution or to deprive the voters of Escambia of their right to adopt a charter. Rather, apart from exercising its legislative judgment, the County Commission was exercising the home rule powers Fla. Const. art. VIII, §1(f); Fla. Stat.

[96]Brief of Appellees at 38-39.

[97]437 U.S. at 544 (White, J.).

[98]*Id.* & n.8.

§125.01(3)(b) (1981) confer on county commissions. Finally, whereas Fla. Const. art. VIII, §1(f); Fla. Stat. §125.01 (1981), do not prohibit county commissions from acting as the County Commission acted,[99] Fla. Const. art. III, §11 prohibits the Florida Legislature from enacting a special law or a general law of local application concerning elections. Accordingly, under Justice White's analysis, the County Commission had the power and was the proper legislative body to adopt a "legislative plan."

CONCLUSION

For the foregoing reasons and the reasons set forth in the Brief of Appellants, the judgment of the Fifth Circuit in *McMillan III* should be reversed.

Respectfully submitted,

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[99]It is noteworthy that the Attorney General's July 19, 1983 letter is at odds with his Op. Att'y Gen. 081-48 (1981) wherein he advised that county commissions may act through their home rule powers unless the Legislature preempts the area. *See* Motion for Leave To File and Brief of Amici Curiae State Association of County Commissioners of Florida, Inc. and the Undersigned Non-Charter Counties of the State of Florida in Support of Appeal at 17-18.